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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 STATE OF WASHINGTON,

8 Plaintiff,

9 and

10 SOCORRO DIAZ SILVAS,  
11 ROXANA RODRIGUEZ,  
12 YESICA CABRERA NAVARRO,  
13 YASMIN CABRERA NAVARRO,  
14 and SAMANTHA MENDOZA,

15 Plaintiffs-Intervenors,

16 v.

17 HORNING BROTHERS, LLC, and  
18 HERMILO CRUZ, in his individual  
19 capacity and as a member of the  
20 martial community of HERMILO  
CRUZ and CLAUDIA SANCHEZ,

Defendants.

NO. 2:17-CV-0149-TOR

ORDER GRANTING THE STATE  
AND PLAINTIFFS-INTERVENORS'  
MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT

BEFORE THE COURT are Defendant Horning Brothers, LLC's Motion for  
Summary Judgment (ECF No. 51); Plaintiffs-Intervenors' Motion for Partial  
Summary Judgment (ECF No. 59); and State of Washington's Motion for Partial

ORDER GRANTING THE STATE AND PLAINTIFFS-INTERVENORS'  
MOTIONS FOR PARTIAL SUMMARY JUDGMENT ~ 1

1 Summary Judgment against Horning Brothers, LLC (ECF No. 62). These matters  
2 were heard with oral argument on September 6, 2018. The Court has reviewed the  
3 record and files herein, and is fully informed. For the reasons discussed below,  
4 Defendant Horning Brothers, LLC's Motion for Summary Judgment (ECF No. 51)  
5 is **DENIED**; Plaintiffs-Intervenors' Motion for Partial Summary Judgment (ECF  
6 No. 59) is **GRANTED**; and State of Washington's Motion for Partial Summary  
7 Judgment against Horning Brothers, LLC (ECF No. 62) is **GRANTED**.

### 8 **BACKGROUND**

9 On April 25, 2017, Plaintiff State of Washington filed this action against  
10 Defendants Horning Brothers, LLC and Hermilo Cruz for violations of Title VII of  
11 the Civil Rights Act of 1964 (Title VII) and the Washington Law Against  
12 Discrimination (WLAD). ECF No. 1. This action concerns allegations of  
13 discriminatory hiring and segregated employment practices because of sex, sexual  
14 harassment, retaliation, and aiding and abetting others in violation of the WLAD.  
15 *Id.* Plaintiff asserts these claims against Horning Brothers and its supervisor, Mr.  
16 Cruz. *Id.* at 5.

17 On June 15, 2017, the Court granted the Proposed Motion to Intervene for  
18 Plaintiffs-Intervenors who were employed by Horning Brothers, supervised by Mr.  
19 Cruz, and were allegedly subjected to sexual harassment, retaliation, and  
20 constructive discharge. ECF No. 10.

1 On July 18, 2018, Horning Brothers filed the instant motion for summary  
2 judgment, which Mr. Cruz joined. ECF Nos. 51; 58. Plaintiffs-Intervenors filed a  
3 motion for partial summary judgment, which the State joined. ECF Nos. 59; 65.  
4 The State also filed a motion for partial summary judgment against Horning  
5 Brothers, which Plaintiffs-Intervenors joined. ECF Nos. 62; 66.

### 6 **FACTS**

7 The following are the undisputed facts unless otherwise noted. For purposes  
8 of summary judgment, “[i]f a party fails to properly support an assertion of fact or  
9 fails to properly address another party’s assertion of fact as required by Rule 56(c),  
10 the court may ... consider the fact undisputed.” Fed. R. Civ. P. 56(e)(2). The  
11 Court acknowledges the State and Plaintiffs-Intervenors’ objections to Defendants’  
12 failure to file a statement of facts in accordance with Local Rule 56.1(b). ECF  
13 Nos. 75 at 9 n.3; 78 at 3-5. The Court also considers their objections that  
14 Defendants’ declarations are merely conclusory and often conflict with statements  
15 made at deposition or in sworn written discovery responses. ECF Nos. 75 at 10-  
16 11; 78 at 5-7; 102 at 6-8; 103 at 4-7. The Court notes below when factual  
17 assertions are disputed and considers any conflicting statements and declarations.  
18 The Court emphasizes that it does not consider any conclusory statements or  
19 irrelevant rhetoric involving Defendants’ shock and dismay over the allegations, as  
20

1 these feelings are not pertinent to the issues currently before the Court. *See* ECF  
2 No. 51 at 8.

### 3 **A. Horning Brothers**

4 Horning Brothers is an agricultural company in Quincy, Washington that  
5 grows a variety of field crops. ECF Nos. 60 at ¶ 1; 63 at ¶ 1; 76 at ¶ 1; 79 at ¶ 1.  
6 Horning Brothers is owned by Allen and Greg Horning, who operate the company  
7 along with their father, Warren Horning, and his wife, Kathy Horning, through a  
8 group of farming, land holding, and asset management companies owned by  
9 members of the Horning family. ECF Nos. 60 at ¶¶ 5-10; 63 at ¶ 2; 76 at ¶ 2; 79 at  
10 ¶ 11.

11 Until March 2017, Horning Brothers only grew onions, and owned and  
12 seasonally operated an onion-packing shed. ECF Nos. 51 at 3; 60 at ¶ 3; 63 at ¶ 3;  
13 76 at ¶ 3; 79 at ¶ 3. Each packing season ran from roughly October to March.  
14 ECF Nos. 51 at 3; 60 at ¶ 13; 63 at ¶ 4; 76 at ¶ 6; 79 at ¶ 13. It is disputed whether  
15 the Horning Brothers employed 20-25 or 27-40 seasonal workers. ECF Nos. 51 at  
16 3; 60 at ¶ 14; 63 at ¶ 4; 76 at ¶ 7; 79 at ¶ 14. Horning Brothers had eight to ten  
17 year-round employees. ECF Nos. 60 at ¶ 11; 76 at ¶ 5; 79 at ¶ 12. The seasonal  
18 workforce spoke largely only in Spanish, but Defendants contend that  
19 approximately a third of the workers also spoke English. ECF Nos. 51 at 4; 60 at ¶

1 15; 63 at ¶ 6; 76 at ¶ 9; 79 at ¶ 15. Allen, Greg, and Warren Horning do not speak  
2 Spanish. ECF Nos. 51 at 4; 60 at ¶ 16; 63 at ¶ 7; 76 at ¶ 10; 79 at ¶ 16.

3 **B. Mr. Cruz**

4 Mr. Cruz is the Horning Brothers' foreman. ECF No. 51 at 3, 5. He worked  
5 full-time for Horning Brothers since June 2004, and Plaintiffs allege that he  
6 became the "Onion Shed Supervisor" in 2006 and remained in that role until  
7 March 2017. ECF Nos. 60 at ¶ 18; 63 at ¶ 8; 76 at ¶ 11; 79 at ¶ 18. Plaintiffs  
8 contend that Mr. Cruz was designated as the "Direct Supervisor" of each of the  
9 onion sorters. ECF Nos. 60 at ¶ 19; 63 at ¶ 9; 76 at ¶ 12; 79 at ¶ 19. They also  
10 assert that from at least 2012 to March 2017, Mr. Cruz was the only person  
11 designated as the "Onion Shed Supervisor," and Allen and Greg Horning were  
12 designated as the "Direct Supervisor[s]" for the "Shop" employees and Mr. Cruz.  
13 ECF Nos. 63 at ¶¶ 9-10; 76 at ¶ 14; 79 at ¶ 19. Mr. Cruz's ability to speak Spanish  
14 was an important factor and the Hornings relied on him to communicate with the  
15 onion sorters. ECF Nos. 51 at 4; 60 at ¶ 22; 63 at ¶¶ 11-12; 76 at ¶¶ 15-16; 79 at ¶  
16 22. Plaintiffs allege that Horning Brothers provided Mr. Cruz no training to be a  
17 supervisor when he became Onion Shed Supervisor. ECF Nos. 63 at ¶ 13; 76 at ¶  
18 17; 79 at ¶ 26.

19 Defendants assert that Mr. Cruz is not a supervisor and did not have  
20 authority to hire, fire, promote, demote, discipline, or raise or reduce any

1 employee's pay or benefits. ECF No. 51 at 5. Defendants explain that Horning  
2 Brothers had a sign-up sheet in the onion shed and workers who wanted to work  
3 the next season would write their names and phone numbers on the sheet. *Id.* at 4.  
4 Allen and Greg Horning asked Mr. Cruz to call the workers on the sheet until they  
5 had commitments from enough workers to fill their staffing needs. *Id.* Mr. Cruz  
6 was directed to first contact those workers who had worked the previous season or  
7 seasons, as Horning Brothers assumed those workers knew the job duties and  
8 requirements. *Id.* at 4-5.

9 While Defendants deny that Mr. Cruz had the authority to hire employees,  
10 Plaintiffs-Intervenors allege that he had authority to hire seasonal onion shed  
11 employees. ECF Nos. 60 at ¶¶ 38-62; 79 at ¶¶ 223-42. Plaintiffs-Intervenors also  
12 argue that Mr. Cruz had the *de facto* authority to terminate seasonal onion shed  
13 employees, authority to affect employees work hours, and authority to assign  
14 employees' work positions in the packing shed. ECF Nos. 60 at ¶¶ 63-86; 79 at ¶¶  
15 243-65.

### 16 **C. Safety Meetings and Harassment Policy**

17 Horning Brothers held periodic "safety meetings." ECF Nos. 51 at 5; 63 at ¶  
18 14; 76 at ¶ 210; 79 at ¶ 266. Plaintiffs allege the agendas show that those meetings  
19 primarily addressed employee safety and conduct rules to prevent workplace  
20 injury. ECF Nos. 63 at ¶ 15; 76 at ¶ 211; 79 at ¶ 267. Item No. 11 on the agenda

1 stated, “Report any threats or harassment immediately to Warren, Greg, or Allen.

2 **HARASSMENT OR THREATS TO OTHER WORKERS WILL NOT BE**

3 **TOLERATED.**” ECF No. 52 at 8 (Ex. B) (emphasis in original). This item was

4 sometimes modified to include or exclude Kayla Cedergreen or Mr. Cruz. ECF

5 Nos. 51 at 6; 63 at ¶ 17; 76 at ¶ 213; 79 at ¶ 281. Plaintiffs emphasize that this

6 item was the sole written or verbal material identified by Horning Brothers as the

7 harassment or discrimination policy applicable while the onion shed was in

8 operation. ECF Nos. 63 at ¶ 20; 76 at ¶ 217; 79 at ¶ 273. They also note that Ms.

9 Cedergreen, who speaks some Spanish, was only on the list from October 24, 2016

10 to February 17, 2017, less than four months. ECF Nos. 63 at ¶¶ 27, 29; 76 at ¶¶

11 224, 226; 79 at ¶¶ 281, 283.

12 Allen or Greg Horning would read through the agenda in English and ask a

13 bilingual employee to translate. ECF Nos. 51 at 6; 63 at ¶ 18; 76 at ¶ 214; 79 at ¶

14 270. Plaintiffs state that Mr. Cruz or Mr. Cruz’s former brothers-in-law, Jose and

15 Arturo Garay, would often translate. ECF Nos. 60 at ¶ 23; 63 at ¶ 18; 76 at ¶ 214;

16 79 at ¶¶ 270-71. Plaintiffs allege that Mr. Cruz admits he did not interpret the

17 safety meetings “word-for-word” and the Hornings had no way of knowing if the

18 Spanish translation was accurate. ECF Nos. 63 at ¶ 22; 76 at ¶ 219; 79 at ¶¶ 277-

19 78. They also assert that witness testimony confirms seasonal workers came away

20 with vastly different understandings of what the Horning Brothers communicated

1 at those meetings. ECF Nos. 63 at ¶ 23; 76 at ¶ 220; 79 at ¶ 279. The meeting  
2 sheets were never provided to workers in Spanish. ECF Nos. 63 at ¶ 24; 76 at ¶  
3 221; 79 at ¶ 279. These meetings never directly addressed sexual harassment nor  
4 retaliation.

5 Plaintiffs allege that Horning Brothers first distributed an Employee  
6 Handbook in June 2017. ECF Nos. 63 at ¶ 32; 76 at ¶ 230. The handbook defines  
7 sexual harassment, contains a complaint procedure including a complaint form,  
8 promises a “thorough” and “confidential” investigation, identifies and prohibits  
9 retaliation, and is available in Spanish. ECF Nos. 63 at ¶ 33; 76 at ¶ 231. The  
10 handbook was issued after the onion packing operations had permanently ceased  
11 and was not distributed to any onion sorter. ECF Nos. 63 at ¶ 34; 76 at ¶ 232.

#### 12 **D. Notice to Horning Brothers**

13 Defendants allege that in the 20 years Horning Brothers ran its onion  
14 packing operation, not a single employee ever reported an instance of sexual  
15 harassment to Greg Horning, Allen Horning, Warren Horning, Kayla Cedergreen,  
16 or Kathy Horning. ECF No. 51 at 7. Defendants state that when an employee had  
17 another kind of complaint, he or she would bring a bilingual co-worker to translate.  
18 ECF Nos. 51 at 7; 63 at ¶ 31; 76 at ¶ 228; 79 at ¶ 285. Defendants also note that all  
19 the employees were generally located within a small area of the onion shed with  
20 Mr. Cruz’s wife, Claudia, along with her daughter and mother. ECF No. 51 at 4.



1 Plaintiffs-Intervenors emphasize that Claudia's mother and daughter worked only  
2 one season each. ECF No. 79 at ¶ 329.

3 Plaintiffs assert that Yesica Cabrera Navarro testified that she complained to  
4 Warren Horning about harassment by Mr. Cruz in December 2014, using Jose  
5 Garay as an interpreter. ECF Nos. 63 at ¶ 35; 76 at ¶ 233; 79 at ¶ 286. Warren  
6 Horning testified that he remembered having a conversation "with Jose and some  
7 lady," but could not recall what she was "upset about." ECF Nos. 63 at ¶ 37; 64-  
8 11 at 10 (Ex. 11); 76 at ¶ 235; 79 at ¶ 287. Yesica Cabrera Navarro testified that  
9 Warren Horning "said that if I was comfortable working there, I could stay. And  
10 that if I wasn't, then it was my decision." ECF Nos. 63 at ¶ 38; 64-13 at 17 (Ex.  
11 13); 76 at ¶ 236. She left her employment within a month. ECF Nos. 63 at ¶ 39;  
12 76 at ¶ 237; 79 at ¶ 297.

13 Horning Brothers allege that Warren Horning did not receive a sexual  
14 harassment complaint about Mr. Cruz from Yesica Cabrera Navarro. ECF No. 100  
15 at 5. Horning Brothers argue that because she does not speak English, and thus she  
16 does not know if Jose Garay translated her sexual harassment claims to Warren  
17 Horning. *Id.* Horning Brothers emphasize that Jose Garay denied that Yesica  
18 Cabrera Navarro complained about sexual harassment. ECF Nos. 100 at 5; 100-6  
19 at 5 (Ex. VI). Horning Brothers emphasize that in her Separation Questionnaire,  
20 she wrote that her reason for leaving was because of back pain and she had a hard

1 time staying late in the onion shed. ECF Nos. 100 at 6; 100-2 at 43-44 (Ex. II).  
2 Yesica Cabrera Navarro testified that she was not able to read the document as it  
3 was in English at the time she filled it out, and that she did not know what she  
4 wrote because she just wanted to leave. ECF No. 100-2 at 43-44. The night after  
5 she quit, she sent a Facebook message to Jose Garay answering his question about  
6 why she left work crying. ECF Nos. 100 at 6; 100-6 at 6-7 (Ex. VI). At his  
7 deposition, Jose Garay stated that she said “her back was hurting and her leg, I  
8 guess. And Hermilo didn’t let her take off.” ECF No. 100-6 at 7. In the Facebook  
9 message, Yesica Cabrera Navarro referred to Mr. Cruz as the boss. *Id.*

10       Roxana Rodriguez de Alfaro filed a complaint against Horning Brothers on  
11 August 14, 2015 with the Washington State Human Rights Commission (HRC),  
12 alleging discrimination on the basis of sex and national origin. ECF Nos. 63 at ¶  
13 41; 64-27 at 2-5 (Ex. 27); 76 at ¶ 239. Her complaint stated that she quit as a result  
14 of the harassment by Mr. Cruz. ECF Nos. 63 at ¶¶ 42-43; 64-27 at 3; 76 at ¶¶ 240-  
15 42. In August 2015, Greg Horning, Allen Horning, Kathy Horning, Kayla  
16 Cedergreen, and Warren Horning received and reviewed the complaint. ECF Nos.  
17 63 at ¶ 44; 64-21 at 12 (Ex. 21); 76 at ¶ 242; 79 at ¶ 298. On September 24, 2015,  
18 Allen Horning provided a written “response” statement on behalf of Horning  
19 Brothers and together with a statement by Mr. Cruz. ECF Nos. 63 at ¶ 45; 64-28 at  
20 2-6 (Ex. 28); 76 at ¶ 243; 79 at ¶ 300. This statement identified Mr. Cruz as “the

1 supervisor in the onion packing shed.” ECF Nos. 63 at ¶ 47; 64-28 at 3; 76 at ¶  
2 245; 79 at ¶ 302. The response related that upon receiving the complaint, “we  
3 immediately spoke to Hermilo ‘Milo’ Cruz. His statement is also included with  
4 my response. We have every reason to believe his version of events.” ECF Nos.  
5 63 at ¶ 48; 64-28 at 3; 76 at ¶ 246; 79 at ¶ 303. Plaintiffs emphasize that the  
6 response does not identify any other steps the Horning Brothers took to investigate  
7 or remedy the alleged discrimination. ECF Nos. 63 at ¶ 49; 76 at ¶ 247; 79 at ¶  
8 304. Plaintiffs note that Horning Brothers did not provide training to Mr. Cruz or  
9 to its workforce following the receipt of the complaint nor take any other action to  
10 address the issues alleged in the complaint. ECF Nos. 63 at ¶¶ 51-56; 76 at ¶¶ 249-  
11 54; 79 at ¶¶ 306-10.

12 On August 2, 2016, the State served a Civil Investigation Demand on  
13 Horning Brothers, notifying it that the State was investigating it for “sexual  
14 harassment and/or retaliation for opposing unfair employment practices.” ECF  
15 Nos. 63 at ¶ 57; 64-29 at 2 (Ex. 29); 76 at ¶ 255; 79 at ¶ 311. Besides responding,  
16 Horning Brothers took no steps to investigate or remedy the alleged sexual  
17 harassment or retaliation between August 2, 2016 and March 2017 other than to  
18 speak to Mr. Cruz. ECF Nos. 63 at ¶ 58; 76 at ¶ 256; 79 at ¶ 312.

#### 19 **E. Allegations Post-Dating Notice to Horning Brothers**

20 Defendants assert that Mr. Cruz denies that he engaged in the acts alleged

1 and no member of the Horning family “ever saw any hint of such behavior.” ECF  
2 No. 51 at 8. Plaintiffs allege that the State has identified ten women who were  
3 sexually harassed by Mr. Cruz. ECF Nos. 63 at ¶ 65; 76 at ¶ 263. The alleged  
4 victims are Claudia Arballo, Yasmin Cabrera, Yesica Cabrera, Socorro Diaz  
5 Silvas, Rosaura Hernandez, Zoelia Isordia, Trinidad Ortega de Lopez, Samantha  
6 Mendoza, Roxanna Rodriguez de Alfaro, and Lizeth Rubio. ECF Nos. 63 at ¶ 66;  
7 76 at ¶ 263. Nine of these women were deposed and testified to being subjected to  
8 offensive sexual comments, conduct, or touching by Mr. Cruz. ECF Nos. 63 at ¶  
9 67; 76 at ¶ 265. Horning Brothers did not take the deposition of Zoelia Isordia, the  
10 tenth victim identified by the State. ECF Nos. 63 at ¶ 68; 76 at ¶ 266. Five of the  
11 ten alleged victims testified that they experienced sexual harassment after Horning  
12 Brothers responded to the HRC complaint on September 24, 2015. ECF Nos. 63 at  
13 ¶ 69; 76 at ¶ 267.

#### 14 **F. March 2017 Investigation**

15 On February 10, 2017, the State notified Horning Brothers that it had been  
16 authorized to bring this lawsuit under Title VII and the WLAD. ECF Nos. 63 at ¶  
17 70; 76 at ¶ 268; 79 at ¶ 318. From March 2, 2017 to May 25, 2017, Horning  
18 Brothers conducted interviews of 20 current and former employees, including Mr.  
19 Cruz. ECF Nos. 63 at ¶ 71; 76 at ¶ 269; 79 at ¶ 319. Kayla Cedergreen and Kathy  
20 Horning took contemporaneous notes during the interviews and typed the notes up

1 “immediately after.” ECF Nos. 63 at ¶ 73; 76 at ¶ 271; 79 at ¶ 321. According to  
2 the interview notes, ten reported having witnessed, heard about, or been subjected  
3 to sexual comments or touching by Mr. Cruz during their employment with  
4 Horning Brothers, which included every one of the full-time employees who were  
5 interviewed. ECF Nos. 63 at ¶ 74; 76 at ¶ 272; 79 at ¶ 322. Plaintiffs allege that  
6 Horning Brothers did not discipline Mr. Cruz following these interviews. ECF  
7 Nos. 63 at ¶ 75; 76 at ¶ 273; 79 at ¶ 323. Mr. Cruz is no longer the shed supervisor  
8 because the Hornings closed the packing shed permanently, but Mr. Cruz still  
9 works for Horning Brothers and Plaintiffs assert that he has not been disciplined in  
10 any way for inappropriate sexual conduct. ECF Nos. 63 at ¶¶ 76-77; 76 at ¶¶ 274-  
11 75; 79 at ¶¶ 324-25.

## 12 DISCUSSION

13 Summary judgment is appropriate when “there is no genuine dispute as to  
14 any material fact and the movant is entitled to judgment as a matter of law.” Fed.  
15 R. Civ. P. 56(a). For purposes of summary judgment, a fact is “material” if it  
16 might affect the outcome of the suit under the governing law. *Anderson v. Liberty*  
17 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is “genuine” where the  
18 evidence is such that a reasonable jury could find in favor of the non-moving party.  
19 *Id.* The moving party bears the initial burden of showing the absence of any  
20 genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323

1 (1986). The burden then shifts to the non-moving party to identify specific facts  
2 showing there is a genuine issue of material fact. *Anderson*, 477 U.S. at 256.

3 In ruling on a motion for summary judgment, the court views the facts, as  
4 well as all rational inferences therefrom, in the light most favorable to the non-  
5 moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The court must only  
6 consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764  
7 (9th Cir. 2002). There must be evidence on which a jury could reasonably find for  
8 the plaintiff and a “mere existence of a scintilla of evidence in support of the  
9 plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252.

#### 10 **A. Title VII Claim**

11 The State and Plaintiffs-Intervenors assert a claim for sexual harassment in  
12 violation of Title VII, as the alleged victims were subject to a hostile work  
13 environment based on their sex. ECF Nos. 1 at ¶ 35; 12 at ¶¶ 47-51. Horning  
14 Brothers, joined by Mr. Cruz (ECF No. 58), argue that they are entitled to  
15 summary judgment on Plaintiffs’ claim for sexual harassment under Title VII.  
16 ECF No. 51 at 10. Plaintiffs also move for summary judgment on this claim. ECF  
17 No. 59; 65.

18 Pursuant to Title VII, a plaintiff must make a *prima facie* case of a hostile  
19 work environment by showing that: “(1) she was subjected to verbal or physical  
20 conduct of a sexual nature, (2) this conduct was unwelcome, and (3) the conduct

1 was sufficiently severe or pervasive to alter the conditions of the victim's  
2 employment and create an abusive working environment.” *Craig v. M & O*  
3 *Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir. 2007) (citation omitted). The Ninth  
4 Circuit requires that “[t]he working environment must both subjectively and  
5 objectively be perceived as abusive.” *Id.* (citation omitted). “Objective hostility is  
6 determined by the totality of the circumstances and whether a reasonable person  
7 with the same characteristics as the victim would perceive the workplace as  
8 hostile.” *Id.*

### 9 **1. Defendants’ Motion for Summary Judgment**

10 Defendants allege that Mr. Cruz has “forcefully and specifically denied the  
11 allegations contained in the complaints.” ECF No. 51 at 10. Defendants also  
12 assert that Mr. Cruz was not a “supervisor” whose actions may be presumptively  
13 imputed to Horning Brothers. *Id.* at 10-11. Defendants insist that most, if not all,  
14 of the Plaintiffs will be unable to establish that they were subjected to a hostile  
15 work environment due to sexual harassment. *Id.* at 11. They contend that  
16 Plaintiffs will be unable to provide evidence that the alleged harassment by Mr.  
17 Cruz should be imputed to Horning Brothers because none of the Plaintiffs ever  
18 reported the harassment to Horning Brothers “despite its explicit direction to all  
19 employees that they do so.” *Id.* at 11-12.

1           The State responds that nine victims have testified to frequent and unwanted  
2 touching that offended or scared them, which defeats Defendants' summary  
3 judgment motion. ECF Nos. 75 at 12-13; 76 ¶¶ 18-161. The State asserts the  
4 victims testified that the harassment included unwelcome compliments, requests  
5 for phone numbers, dates, sexual pictures, and sex, as well as crude gestures,  
6 comments about sex, sexual dreams, and masturbation. ECF Nos. 75 at 13; 76 at  
7 ¶¶ 21, 23, 27-31, 38-40, 44, 56-59, 68-71, 73, 80-81, 84-92, 96, 98, 101, 117-20,  
8 132-34, 143, 148, 150-52. The victims also allege that Mr. Cruz touched, rubbed,  
9 and grabbed them in tight spaces on the sorting line or outside near bathrooms  
10 where he would surprise them as they exited. ECF Nos. 75 at 13; 76 at ¶¶ 22, 25-  
11 26, 45, 52, 54, 61, 72, 75, 82, 97, 104, 109, 112-13, 122, 142, 153-54. The victims  
12 testified that this conduct was frequent, often occurring daily or almost daily. ECF  
13 Nos. 75 at 13; 76 at ¶¶ 21, 50, 55, 72, 80, 110, 133. They described the harassment  
14 as making them feel uncomfortable, offended, embarrassed, disgusted, humiliated,  
15 nervous, and scared. ECF Nos. 75 at 14; 76 at ¶¶ 25, 46, 52, 72, 77, 85, 96, 101,  
16 125, 128, 131, 144. The State then argues that this evidence is more than sufficient  
17 for a reasonable juror to find objectively and subjectively offensive. ECF No. 75  
18 at 14.

19           Plaintiffs-Intervenors assert that their testimony creates a genuine issue for  
20 trial because they testified that Mr. Cruz touched their bodies, buttocks, breasts,



1 and hips, pressed his penis into their bodies, grabbed them and kissed them. ECF  
2 Nos. 78 at 8; 79 at ¶¶ 30, 33-38, 64, 66, 73, 75, 100, 105-08, 149, 153, 158, 164-  
3 65, 172, 191, 194, 200. They allege that he made sexual comments and gestures,  
4 including propositioning them for sex or romantic relationships, commenting about  
5 their bodies and appearance, and asking them out. ECF Nos. 78 at 8; 79 at ¶¶ 31,  
6 39-45, 68-73, 76, 97-98, 101, 103-04, 109-13, 115-20, 150, 157, 161-63, 168-69,  
7 171, 190, 193, 196-97. Plaintiffs-Intervenors also emphasize that these acts  
8 occurred frequently. ECF Nos. 78 at 9; 79 at ¶¶ 32, 34, 67, 99, 115, 150, 189.  
9 Plaintiffs-Intervenors then conclude that a reasonable woman would have found  
10 Mr. Cruz's conduct created a hostile work environment. ECF No. 78 at 9.

11 Mr. Cruz replies that the facts alleged do not objectively add up to a hostile  
12 work environment because the alleged acts are not "hellish," "nightmarish," or  
13 "extreme" conditions. ECF No. 98 at 7. Mr. Cruz argues the work environment  
14 was also not subjectively abusive because some Plaintiffs socialized with Mr. Cruz  
15 and his wife outside of work. *Id.* at 8-10.

16 The Court agrees with the State and Plaintiffs-Intervenors that the  
17 overwhelming evidence, when viewed in the light most favorable to them,  
18 establishes a genuine issue of material fact. A reasonable jury could find that the  
19 alleged victims were subject to verbal and physical conduct of a sexual nature,  
20 which was unwelcome and created an abusive working environment. They

1 provide sufficient evidence of objective hostility that a reasonable person could  
2 perceive the workplace as hostile. The Court then finds that Defendants fail to  
3 show the absence of any material fact in light of the victims' testimony of  
4 unwelcome sexual contact that made them uncomfortable, disgusted, humiliated,  
5 and scared. The Court is not persuaded by Defendants' conclusory allegations that  
6 Plaintiffs would be unable to establish a claim for sexual harassment and Mr.  
7 Cruz's argument that because some Plaintiffs socialized outside of work with Mr.  
8 Cruz and his family at a birthday party means that they are unable to establish  
9 sexual harassment. *See* ECF No. 8-10. The Court then denies Defendants' motion  
10 to dismiss the sexual harassment claim in regards to Mr. Cruz's liability.

11       Additionally, the Court is not persuaded by Defendants' argument that  
12 because Mr. Cruz has denied he committed the alleged sexual harassment, it would  
13 be improper for the Court to rule on other issues that depend on sexual harassment  
14 being established. ECF No. 73 at 4. The State asserts that it is well-settled that a  
15 district court may grant summary judgment on a claim or defense to narrow the  
16 issues for trial. ECF No. 102 at 9. The State argues that it does not matter that  
17 Defendants dispute the facts underlying the harassment. *Id.* Plaintiffs-Intervenors  
18 contend that a court may determine an alleged harasser's authority regardless of  
19 whether the existence of a hostile work environment is disputed. ECF No. 103 at  
20 2. Plaintiffs-Intervenors insist that if they prove at trial that Mr. Cruz created a

1 hostile work environment, the previous determinations of elements of liability will  
2 ensure a more just and speedy resolution of the case. *Id.* at 3. This Court agrees  
3 with Plaintiffs and finds that it may analyze each of the disputed claims and  
4 defenses without first making a decision on the alleged harassment so as to narrow  
5 the issues for trial, which is appropriate under a motion for summary judgment.

6 **2. Plaintiffs’ Motion for Partial Summary Judgment on the Vicarious**  
7 **Liability of Horning Brothers**

8 Plaintiffs-Intervenors respond to Defendants’ summary judgment motion by  
9 arguing that the undisputed facts demonstrate Horning Brothers is vicariously  
10 liable under Title VII for all of Mr. Cruz’s harassment. ECF No. 78 at 11.

11 Plaintiffs-Intervenors, joined by the State (ECF No. 65), also assert in their Motion  
12 for Partial Summary Judgment that Horning Brothers is vicariously liable as Mr.  
13 Cruz is a “supervisor” under Title VII. ECF No. 59 at 5.

14 The Court first addresses whether Mr. Cruz is a supervisor. The Supreme  
15 Court has determined that an “employee is a ‘supervisor’ for purposes of vicarious  
16 liability under Title VII if he or she is empowered by the employer to take tangible  
17 employment actions against the victim.” *Vance v. Ball State Univ.*, 570 U.S. 421,  
18 424 (2013). A tangible employment action is “a significant change in employment  
19 status, such as hiring, firing, failing to promote, reassignment with significantly  
20

1 different responsibilities, or a decision causing a significant change in benefits.”

2 *Id.* (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)).

3 First, Plaintiffs allege that Mr. Cruz is a supervisor because Horning  
4 Brothers gave him authority to hire. ECF No. 59 at 6. In pre-suit interrogatories,  
5 Horning Brothers recognized Mr. Cruz “has the authority to hire.” ECF Nos. 59 at  
6 7; 60 at ¶ 38. Horning Brothers also asserted that it has “given Hermilo Cruz the  
7 authority to hire employees during the onion packing season.” ECF Nos. 59 at 7;  
8 60 at ¶ 39. Horning Brothers admitted in their answers to Plaintiffs’ complaints  
9 that Mr. Cruz shared authority with the owners to determine who would be hired  
10 the following season. ECF Nos. 59 at 7; 60 at ¶ 41.

11 Plaintiffs also contend that the hiring process for seasonal workers shows  
12 Mr. Cruz had authority to hire where interested workers signed up for employment  
13 on the “employee sign up list.” ECF Nos. 59 at 7; 60 at ¶ 43; 51 at 4. Horning  
14 Brothers told Mr. Cruz how many workers to hire, and Mr. Cruz filled out those  
15 positions from those sign-up sheets. ECF Nos. 59 at 7; 60 at ¶ 44; 51 at 4.

16 Plaintiffs emphasize that Mr. Cruz was part of the “final call” in determining  
17 which workers would be rehired and ultimately controlled who would be offered  
18 employment because he made almost every hiring offer to the season onion shed  
19 employees with no review or oversight by the Hornings. ECF Nos. 59 at 7; 60 at  
20 ¶¶ 40, 42, 45, 52.

1           Second, Plaintiffs insist that Mr. Cruz’s authority to rehire former employees  
2 with little to no oversight by Horning Brothers gave him a *de facto* authority to  
3 terminate employment. ECF Nos. 59 at 8; 60 at ¶ 63. Plaintiffs assert that Mr.  
4 Cruz did not rehire a worker who complained about him to the Hornings or was  
5 considered a “troublemaker.” ECF Nos. 59 at 8; 60 at ¶¶ 67-68. Employees were  
6 aware Mr. Cruz did no rehire women who complained, and they told Horning  
7 Brothers that they feared if they reported the harassment he would retaliate and not  
8 rehire them. ECF Nos. 59 at 8; 60 at ¶¶ 69-70.

9           Third, Plaintiffs argue that, at a minimum, the Horning Brothers effectively  
10 delegated the power to hire to Mr. Cruz because of their reliance on his substantial  
11 input and their admissions that Mr. Cruz shared authority with the owners to  
12 determine who would be hired. ECF Nos. 59 at 9; 60 at ¶¶ 41-42, 46-51. Pursuant  
13 to *Vance*, an employer likely relies on other workers who actually interact with the  
14 affected employee, and under those circumstances “the employer may be held to  
15 have effectively delegated the power to take tangible employment actions to the  
16 employees on whose recommendations it relies.” 570 U.S. at 447. Plaintiffs here  
17 then contend that the Hornings relied on Mr. Cruz because they could not speak  
18 Spanish and could not recognize almost any of their seasonal employees by name  
19 or face because “they all look alike.” ECF No. 59 at 10-11; 60 at ¶ 49; 61-10 at 11  
20

1 (Ex. J). Whereas Mr. Cruz worked closely with the seasonal employees. ECF  
2 Nos. 59 at 11; 60 at ¶¶ 21, 50.

3 Fourth, Plaintiffs argue that Mr. Cruz caused significant changes in  
4 employment status, including controlling employee hours, assigning and  
5 reassigning positions, and changing benefits. ECF No. 59 at 11. Plaintiffs  
6 emphasize that Mr. Cruz was the only person designated as the “Onion Shed  
7 Supervisor” in the company’s employee records and submissions to the State. ECF  
8 Nos. 59 at 12; 60 at ¶ 18. Mr. Cruz and the Hornings affirmed to the employees  
9 that Mr. Cruz was in charge of the onion shed. ECF Nos. 59 at 12; 60 at ¶¶ 24-25.  
10 He had the authority to change work hours in the shed and to engage workers for  
11 additional time to clean after the usual packing shed hours, thereby actually giving  
12 more hours and wages only to certain employees. ECF Nos. 59 at 12; 60 at ¶¶ 71-  
13 75. Mr. Cruz had the authority to approve or deny requests for time off. ECF Nos.  
14 59 at 12; 60 at ¶¶ 76-79. He could assign seasonal employees to positions on the  
15 packing line, including positions with the primary duty of removing rotten onions.  
16 ECF Nos. 59 at 12; 60 at ¶¶ 80-86.

17 Defendants respond that Horning Brothers have denied that they granted Mr.  
18 Cruz supervisory authority. ECF Nos. 73 at 5; 97 at 3. Mr. Cruz has also denied  
19 that he had authority to hire, fire, promote, demote, discipline, raise, or reduce any  
20 worker’s pay or benefits or set work hours. ECF Nos. 73 at 5; 74 at ¶¶ 3-4; 97 at 3.

1 Defendants argue that actual or apparent authority can only come from Horning  
2 Brothers and it does not matter what Mr. Cruz or any other party says about his  
3 authority. ECF No. 73 at 6.

4 The Court finds that Mr. Cruz is a supervisor. In response to an  
5 interrogatory, Horning Brothers stated:

6 Allen, Greg, and Warren have given Hermilo Cruz the authority to  
7 hire employees during the onion packing season as needed in order to  
8 replace employees who have quit. Hermilo is able to move employees  
9 to different positions in the packing shed due to reasons such as; the  
changing quality or size of the onion crop, excessive talking between  
employees, or other distractions.

10 ECF No. 61-1 at 8 (Ex. A). Horning Brothers clarify that Mr. Cruz does not have  
11 the authority to fire employees, but only “the authority to hire, change hours  
12 worked because of load orders, move employees to different locations of the onion  
13 packing line due to changing crop conditions or conflicting personalities.” *Id.*

14 Warren Horning testified in a deposition that Mr. Cruz hired onion sorters  
15 off of the sign-up sheet and they both decided who worked what positions on the  
16 belt. ECF No. 61-10 at 24 (Ex. J). Warren Horning also noted that Mr. Cruz  
17 approved requests for time off from workers in the shed. *Id.* at 25-26. He stated  
18 that Mr. Cruz had a role in or was responsible for disciplining sorters. *Id.* at 27.  
19 Warren Horning agreed that Mr. Cruz was “part of that final call” to rehire  
20 seasonal employees the next year. *Id.* at 15.

1 In Horning Brothers' answer to the State's Complaint, Horning Brothers  
2 "admits that as a Supervisor, Defendant Cruz helped to oversee operations at the  
3 onion packing shed and had input and involvement in the hiring of seasonal  
4 employees, the setting of work days and the making of job assignments." ECF No.  
5 15 at 2. In Horning Brothers' answer to Plaintiffs-Intervenors' Complaint,  
6 Horning Brothers admitted that:

7 Defendant Cruz was a supervisor in the onion packing shed at all  
8 relevant times, but denies that Defendant Cruz was the supervisor.  
9 Defendant Horning Brothers admits that Defendant Cruz was a  
10 supervisor helped to oversee operations at the onion packing shed and  
11 had input and involvement in the hiring of seasonal employees, the  
12 setting of work hours and the making of job assignments.

13 ECF No. 23 at 2. In Mr. Cruz's answer to the State's Complaint, he "admit[s] that  
14 as a Supervisor, Defendant Cruz helped oversee operations at the onion packing  
15 shed and had input and involvement in the hiring of seasonal employees, the  
16 setting of work hours and the making of job assignments." ECF No. 13 at 3. Mr.  
17 Cruz further admitted that "the owners and Defendants Cruz would determine who  
18 would be offered work the following season based on the needs of the company."  
19 *Id.* Allen Horning's response to the HRC complaint also identified Mr. Cruz as  
20 "the supervisor in the onion packing shed." ECF No. 64-28 at 3 (Ex. 28).

In their Motion for Summary Judgment, Defendants state that Allen or Greg  
Horning asked Mr. Cruz "to call the workers on the sign-up sheet until they had



1 commitments from enough workers to fill their staffing needs.” ECF No. 51 at 4.  
2 Yet, Defendants adamantly insist that Mr. Cruz did not have the authority to hire,  
3 fire, promote, demote, discipline, or raise or reduce any employee’s pay or  
4 benefits. ECF Nos. 51 at 5; 52 at ¶ 4. In a supplemental declaration, Mr. Cruz  
5 asserts that he does not have this authority. ECF No. 74 at ¶¶ 3-4.

6 In light of the evidence and Defendants’ own admissions, the Court is not  
7 persuaded by Defendants bare assertions that Mr. Cruz did not have supervisory  
8 authority. Defendants admit in all of their answers that Mr. Cruz is a supervisor.  
9 Even if Defendants’ previous assertions of Mr. Cruz as supervisor is irrelevant,  
10 Horning Brothers still concede that Mr. Cruz had the authority to hire employees  
11 and move employees around the shed which constitutes supervisor authority under  
12 its “specific legal meaning.” *See* ECF No. 97 at 3. Warren Horning also admitted  
13 that Mr. Cruz hired onion sorters from the sign-up sheet list, approved requests for  
14 time off, disciplined employees, and was part of the final call to rehire employees.  
15 While Horning Brothers asserted that Mr. Cruz did not have authority to fire  
16 employees, the Court finds this one action insufficient to overcome supervisor  
17 liability when Mr. Cruz still had the authority to hire, reassign, and change  
18 employees’ responsibilities. These actions constitute a tangible employment action  
19 as they are significant changes in employment status. Defendants’ conclusory  
20 assertion of non-liability is insufficient. The Court finds there is no genuine

1 dispute, and Mr. Cruz is a supervisor in light of Defendants' concessions and the  
2 overwhelming evidence in the record. The Court finds that Horning Brothers is  
3 then vicariously liable for the actions of Mr. Cruz as a supervisor. *See Vance*, 570  
4 U.S. at 431.

5 **B. *Ellerth-Faragher* Defense**

6 Defendants insist that they are entitled to summary judgment on their  
7 *Ellerth-Faragher* defense even if Mr. Cruz is a supervisor. ECF No. 51 at 12. The  
8 State responds that it is entitled to summary judgment on this defense and moves  
9 for summary judgment in a separate motion. ECF Nos. 75 at 14; 62 at 9.  
10 Plaintiffs-Intervenors respond that Defendants cannot establish this affirmative  
11 defense and join in the State's Motion for Partial Summary Judgment. ECF Nos.  
12 78 at 12; 66.

13 The *Ellerth-Faragher* defense is an exception to the general rule that  
14 harassment committed by a high-level manager will be automatically imputed to  
15 the employer. *Ellerth*, 524 U.S. at 742; *Faragher v. City of Boca Raton*, 524 U.S.  
16 775 (1998). To qualify for the defense, an employer must make a threshold  
17 showing that the affected employee has not suffered any tangible adverse  
18 employment action, such as discharge, demotion, or undesirable reassignment in  
19 connection with the harassment. *Ellerth*, 524 U.S. at 765. Once this showing has  
20 been made, the employer may avoid vicarious liability by proving: (1) that it

1 exercised reasonable care to prevent and promptly correct the harassing behavior  
2 and (2) that the employee unreasonably failed to take advantage of preventative or  
3 corrective opportunities provided by the employer or otherwise failed to prevent  
4 the alleged harm. *Id.* The policy behind this defense is that an employer should be  
5 able to avoid vicarious liability “in situations where it acts promptly to remedy  
6 harassment.” *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001).

7       The *Ellerth-Faragher* defense only applies to harassment committed by an  
8 employee’s supervisor. *See Ellerth*, 524 U.S. at 765 (employer may seek to avoid  
9 vicarious liability for “misuse of supervisory authority” perpetrated by a supervisor  
10 “with immediate (or successively higher) authority over the employee”). As this  
11 Court has determined that Mr. Cruz is a supervisor, the Court addresses  
12 Defendants’ affirmative defense below. Additionally, Defendants assert that none  
13 of the Plaintiffs can show a tangible employment action because none were  
14 reassigned to an inferior position, demoted, or fired. ECF No. 51 at 13. Plaintiffs  
15 do not address whether a tangible adverse employment action occurred, and the  
16 Court then assumes for the purposes of these motions that Defendants meet this  
17 threshold requirement.

18       Here, Defendants argue summary judgment is appropriate on all of  
19 Plaintiffs’ hostile work environment claims. ECF No. 51 at 12. Defendants note  
20 that they can establish the first element because they maintained an anti-

1 harassment policy, arguing that their policy was legally adequate as a matter of law  
2 because the seasonal workforce was small and the Hornings were available and  
3 interacted with the workers on a near daily basis. *Id.* at 13-14. Defendants insist  
4 that Plaintiffs failed to report Mr. Cruz's alleged harassment while they worked in  
5 the onion shed, thereby not allowing Horning Brothers the opportunity to eliminate  
6 or mitigate the harm. *Id.* at 14.

7 In the State's Motion for Partial Summary Judgment, joined by Plaintiffs-  
8 Intervenor (ECF No. 66), Plaintiffs argues that Horning Brothers' harassment  
9 policy was ineffective because it failed to define sexual harassment or prohibit  
10 retaliation and it was unsuited to its Spanish-speaking workforce. ECF No. 62 at  
11 10-16. Plaintiffs concedes that while a smaller employer's policy may be less  
12 formal than a larger employer's policy, an *Ellerth-Faragher* prerequisite for an  
13 employer of any size is a complaint reporting and resolution process that is  
14 effective and suitable to the employment circumstance. ECF No. 62 at 11;  
15 *Faragher*, 524 U.S. at 806; Enforcement Guidance: Vicarious Employer Liability  
16 for Unlawful Harassment by Supervisors, 1999 WL 33305874, at \*15.

17 Plaintiffs insists that Horning Brothers' harassment policy was not an  
18 effective mechanism because it did not provide a definition of sexual harassment  
19 or provide a statement that retaliation will not be tolerated. ECF Nos. 62 at 12;  
20 102 at 11; *see Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1180 (9th Cir. 2001); *see*

1 *also Montero v. AGCO Corp.*, 192 F.3d 856, 862 (9th Cir. 1999). The harassment  
2 policy was read aloud at safety meetings, but Mr. Cruz did not interpret the policy  
3 word-for-word. ECF No. 62 at 12-13; 63 at ¶ 22. The policy stated, “Report any  
4 threats or harassment immediately to Warren, Greg, or Allen. **HARASSMENT**  
5 **OR THREATS TO OTHER WORKERS WILL NOT BE TOLERATED.**”  
6 ECF No. 52 at 8 (Ex. B) (emphasis in original). Plaintiffs emphasizes that this  
7 policy does not refer to “sexual” harassment, let alone define it. ECF No. 62 at 13.  
8 Plaintiffs asserts that this policy is insufficient as a “general nondiscrimination  
9 policy [that] did not address sexual harassment in particular, and thus did not alert  
10 employees to their employer’s interest in correcting that form of discrimination.”  
11 ECF No. 62 at 13; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72-73 (1986);  
12 *see also* 29 C.F.R. § 1604.11(f). Failure to identify or prohibit retaliation creates  
13 the predictable “fear of losing [one’s] job if [the victim] reports harassing  
14 conduct.” ECF No. 62 at 13-14; *Brandrup v. Starkey*, 30 F. Supp. 2d 1279, 1288  
15 n.4 (D. Or. 1998); *see also* EEOC Guidance, 1999 WL 33305874, at \*10 (“An  
16 anti-harassment policy and complaint procedure will not be effective without [an  
17 anti-retaliation] assurance.”).

18 Plaintiffs emphasize that Horning Brothers’ onion shed workforce was  
19 largely Spanish-speaking, but it did not provide a written harassment policy in  
20 Spanish or take steps that its “safety meeting sheet” was interpreted accurately at

1 meetings. ECF Nos. 62 at 15-16; 102 at 12. Warren, Greg, and Allen Horning  
2 could not speak Spanish but were designated to receive complaints. ECF No. 62 at  
3 16. Mr. Cruz was the only person who spoke Spanish designated to receive  
4 complaints. *Id.* Plaintiffs notes that Kayla Cedergreen could speak some Spanish  
5 and was briefly on the list of persons to whom employees could report harassment.  
6 *Id.* at 16 n.5. Horning Brothers did not provide or offer to provide interpreters, but  
7 an employee would need to find and bring her own interpreter. *Id.* at 16.

8       Second, Plaintiffs contends that Horning Brothers failed to exercise  
9 reasonable care to promptly correct sexually harassing behavior. ECF Nos. 62 at  
10 17; 102 at 12-13. In August 2015, Roxana Rodriguez de Alfaro filed a detailed  
11 complaint against Horning Brothers with the HRC alleging sexual harassment by  
12 Mr. Cruz. ECF Nos. 62 at 18; 63 at ¶¶ 41-42. Plaintiffs emphasize that Horning  
13 Brothers merely spoke with Mr. Cruz, but conducted no investigation, interviewed  
14 no other employees, provided not training to Mr. Cruz or other employees, made  
15 no changes to its harassment policy or to Mr. Cruz's job duties, and did not  
16 discipline Mr. Cruz in any way. ECF Nos. 62 at 18-19; 63 at ¶¶ 49-56. After the  
17 State served an investigation subpoena citing "sexual harassment," Horning  
18 Brothers spoke to Mr. Cruz, but again conducted no investigation, provided no  
19 training, made no changes to its policies or Mr. Cruz's supervisory duties, and  
20 imposed no discipline. ECF Nos. 62 at 19; 63 at ¶¶ 58-64. On February 10, 2017,

1 the Attorney General's Office advised Horning Brothers of its intent to file suit and  
2 on March 2, 2017, Horning Brothers commenced an internal inquiry. ECF Nos. 62  
3 at 19; 63 at ¶¶ 70-72. The State notes that this inquiry occurred seventeen months  
4 after it acknowledged receipt of the HRC complaint, which is not prompt  
5 corrective action. ECF Nos. 62 at 19; 63 at ¶¶ 71-72.

6 Defendants respond that *Faragher* and the EEOC guidelines specifically  
7 acknowledge that a small employer that regularly interacts with its employees and  
8 effectively communicates that harassment will not be tolerated need not even have  
9 a written harassment policy. ECF Nos. 73 at 8; 51 at 13; 97 at 6. Additionally,  
10 Defendants argue that Roxana Rodriguez de Alfaro's complaint was made six  
11 months after she quit, which cannot make Horning Brothers liable as a matter of  
12 law for every instance of sexual harassment that allegedly occurred after that  
13 complaint. ECF No. 73 at 8. Defendants insist that because the complaint alleged  
14 sexual harassment of only one employee who quit without report it to the  
15 Hornings, they handled the complaint appropriately given the importance of  
16 confidentiality and that they heard nothing further from the HRC on this matter.  
17 *Id.* at 9-10. Given the importance of confidentiality, Defendants assert that it  
18 would have been unreasonable for Horning Brothers to immediately interview all  
19 of their employees about the allegations. *Id.* at 10.

1 In response to Defendants’ Motion for Summary Judgment, the State argues  
2 that regardless of the size of the employer or its workforce, a policy must be  
3 “effectively disseminate[d]” to employees, provide an “effective mechanism for  
4 reporting and resolving complaints of sexual harassment,” and be “suitable to the  
5 employment circumstances.” ECF Nos. 75 at 16; 102 at 10-11; *Faragher*, 524  
6 U.S. at 806-09; EEOC Guidance, 1999 WL 33305874, at \*15. The State and  
7 Plaintiffs-Intervenors also assert that Yesica Cabrera Navarro testified that she did  
8 report Mr. Cruz’s harassment to Warren Horning in December 2015. ECF Nos. 75  
9 at 17; 76 at ¶¶ 282-83; 78 at 14. Other workers were also aware she complained,  
10 that Horning Brothers did nothing to address the alleged harassment, and that any  
11 worker who complained was not rehired the following season. ECF Nos. 75 at 17;  
12 76 at ¶ 276; 78 at 15.

13 The State argues that evidence of a reasonable fear of retaliation from  
14 reporting harassment is sufficient to defeat an *Ellerth-Faragher* defense on  
15 summary judgment. ECF No. 75 at 18; *Holly D. v. California Inst. of Tech.*, 339  
16 F.3d 1158, 1179 n.24 (9th Cir. 2003) (The court cites Dr. Fitzgerald to show that  
17 “victims of sexual harassment may face considerable difficulty in reporting the  
18 wrongdoing or taking other affirmative steps to seek relief .... [I]n some cases, a  
19 victim’s particular circumstances may render the failure to seek relief through the  
20 employer’s available procedures objectively reasonable.”). The State and



1 Plaintiffs-Intervenors note that victims and witnesses feared losing their jobs if  
2 they complained about Mr. Cruz, and they needed the work because there are few  
3 winter agricultural jobs available in Quincy. ECF Nos. 75 at 17; 76 at ¶ 279; 78 at  
4 15. They emphasize Dr. Fitzgerald's opinion that a victim's decision to delay or  
5 not report is in line with what social scientists know about women's response to  
6 sexual harassment in the workplace. ECF Nos. 75 at 18; 76 at ¶ 281; 78 at 15.

7 In Plaintiffs-Intervenors' response to Defendants' Motion for Summary  
8 Judgment, they argue that Horning Brothers' policy does not meet the  
9 requirements of an effective anti-harassment policy because it fails to define sexual  
10 harassment, fails to provide any means for Spanish-speaking employees to bypass  
11 the harassing supervisor in complaining, fails to describe disciplinary measures the  
12 company may use in a harassment case, fails to provide a statement that retaliation  
13 will not be tolerated, and was not disseminated in Spanish except through the  
14 harasser's inaccurate interpretation. ECF No. 78 at 12-13. Plaintiffs-Intervenors  
15 emphasize that Defendants were notified of Mr. Cruz's harassing conduct in  
16 December 2014, August 2015, and August 2016. *Id.* at 13. Even if Horning  
17 Brothers is a small employer, Plaintiffs-Intervenors argue that size does not excuse  
18 a failure to stop sexual harassment once it is known to the employer. *Id.*

19 The Court finds that Horning Brothers failed to have a sufficient harassment  
20 policy—verbal or written, even though it may be a small employer. Defendants cite

1 *Faragher* that the employer of a small work force “might expect that sufficient  
2 care to prevent tortious behavior could be exercised informally....” 524 U.S. at  
3 808. Defendants also emphasizes the EEOC’s Guidance, which states, “If [a small  
4 business] puts into place an effective, informal mechanism to prevent and correct  
5 harassment, a small employer could still satisfy the first prong of the affirmative  
6 defense to a claim for harassment.” EEOC Guidance, 1999 WL 33305874, at \*15.  
7 The EEOC explains that a small business may not need to disseminate a written  
8 policy if it effectively communicated the prohibition and effective complaint  
9 procedure at staff meetings. *Id.*

10 The Court finds that even as a small business owner, Horning Brothers fails  
11 to have an effective mechanism to prevent and correct harassment. While Horning  
12 Brothers disseminated a harassment policy at its safety meetings, this policy was  
13 ineffective at communicating a prohibition of sexual harassment and an effective  
14 complaint procedure. The policy does not mention sexual harassment or a ban on  
15 retaliation, nor does the evidence show that the Hornings further clarified the  
16 policy at the meetings.

17 The Hornings’ communication of the policy was also ineffective as Mr. Cruz  
18 often interpreted the policy to the mainly Spanish-speaking seasonal employees,  
19 but not “word-for-word” and it is unclear if the employees actually understood the  
20 policy. When asked if she remembered Mr. Cruz saying anything like Item No.

1 11, Roxana Rodriguez de Alfaro testified, “No, I don’t remember that. He didn’t  
2 speak about that, only about safety, but not about harassment.” ECF No. 64-14 at  
3 6 (Ex. 14). Yasmin Cabrera Navarro stated, “No, because what he said was that if  
4 any worker bothered you, you could report that person to the bosses. But I don’t  
5 remember him saying if they’re harassing you.” ECF No. 64-12 at 6 (Ex. 14).  
6 Claudia Arballo also responded, “No, I don’t remember that one .... We were just  
7 told that if there was a problem or something, that the father was there and Greg  
8 and Allen and Don Hermilo.” ECF No. 64-16 at 5 (Ex. 16). Rangel Neri stated,  
9 “There were meetings conducted by the Hornings. At the meetings, they explained  
10 the workplace safety and behavior rules. Hermilo interpreted for them. I don’t  
11 remember that they explained how one reports workplace discrimination or sexual  
12 abuse.” ECF No. 61-28 at ¶ 6.

13 Yet, Horning Brothers asserts that Socorro Diaz Silvas, Yasmin Cabrera  
14 Navarro, and Roxana Rodriguez de Alfaro were aware of reporting procedures.  
15 ECF No. 97 at 7-8. Socorro Diaz Silvas testified that “not much was said” about  
16 Item No. 11. ECF No. 100-1 at 10 (Ex. I). Yasmin Cabrera Navarro stated that  
17 she remembered Item No. 11, but clarified that “we were never told, [i]f your  
18 foreman bothers you, then report it to your foreman so he can go with you to report  
19 it. I mean, there was no way to report it.” ECF No. 100-3 at 16 (Ex. III). Roxana  
20 Rodriguez de Alfaro testified that Mr. Cruz did not speak about harassment, as

1 discussed above. ECF No. 100-5 at 10-11 (Ex. V). This “awareness of reporting  
2 procedures” does not show an awareness of reporting sexual harassment, especially  
3 harassment conducted by a foreman. *See* ECF No. 97 at 7-8.

4 This testimony is persuasive in showing that reading the policy at the safety  
5 meeting was an ineffective mechanism to prevent and correct sexual harassment,  
6 even under the more accommodating standard for small businesses. Many of the  
7 employees were not aware of a sexual harassment or discrimination policy and the  
8 mechanisms to report such harassment. Horning Brothers’ reporting policy was  
9 also ineffective where alleged victims had to bring their own interpreter or speak to  
10 Mr. Cruz, as the Horning family did not speak Spanish. The victims were also not  
11 aware that there would be no retaliation for reporting, but evidence shows that  
12 Yesica Cabrera Navarro possibly suffered such retaliation as discussed below.

13 A small business owner is held to the same standard as any employer when  
14 attempting to correct alleged sexual harassment. The EEOC explains that if a  
15 complaint is made, a small business employer, “like any other employer, must  
16 conduct a prompt, thorough, and impartial investigation and undertake swift and  
17 appropriate corrective action where appropriate.” EEOC Guidance, 1999 WL  
18 33305874, at \*15. Horning Brothers failed to act promptly after being notified of  
19 the alleged harassment by Roxana Rodriguez de Alfaro and possibly Yesica  
20 Cabrera Navarro. The Court is not persuaded by Defendants’ argument that

1 merely because Roxana Rodriguez de Alfaro filed a complaint after leaving their  
2 employment means that Defendants are not liable for any alleged sexual  
3 harassment. *See* ECF No. 73 at 9-10. Given that Defendants were then on notice  
4 of Mr. Cruz's alleged sexual harassment, they could have taken prompt action to  
5 correct the harassing behavior. *See* ECF No. 102 at 14. While the complaint only  
6 involved one alleged victim who was no longer employed by Horning Brothers, the  
7 alleged harasser was still employed by Horning Brothers and Defendants are then  
8 not excused from taking prompt corrective action besides merely speaking with  
9 Mr. Cruz. The importance of confidentiality does not preclude Defendants from  
10 clarifying their harassment policy to their employees, training their employees, or  
11 investigating the matter further. *See id.* at 15. The Court is then not persuaded that  
12 Defendants were not required to take any reasonably prompt corrective behavior  
13 when they were at least aware of the allegation by Roxana Rodriguez de Alfaro  
14 and also possibly aware according to Yesica Cabrera Navarro's complaint when  
15 she was still employed by Horning Brothers.

16 The overall purpose of the *Ellerth-Faragher* defense is to avoid vicarious  
17 liability where an employer acts promptly to remedy harassment. The evidence  
18 shows that Horning Brothers took no action to remedy the alleged sexual  
19 harassment besides speaking to Mr. Cruz regarding the HRC complaint. This  
20 defense is meant to encourage employers to adopt anti-harassment policies, which

1 Horning Brothers failed to do as their discrimination policy and reporting  
2 mechanism were ineffective in addressing and preventing sexual harassment.  
3 There are no disputed material facts precluding summary judgment on this issue.  
4 Accordingly, the Court finds the *Ellerth-Faragher* defense inapplicable and  
5 inappropriate where Horning Brothers' policy and actions were clearly insufficient  
6 to prevent and address the alleged sexual harassment.

### 7 C. WLAD

8 Plaintiffs assert a claim for hostile work environment under RCW 49.60.  
9 ECF Nos. 1 at ¶ 41; 12 at ¶¶ 56-60. All parties seek summary judgment on this  
10 claim. ECF Nos. 51 at 15; 59 at 13; 65. WLAD has the same material factors for  
11 employment discrimination based on sex as Title VII. *See Antonius v. King Cty.*,  
12 153 Wash.2d 256, 261 (2004). The elements of a prima facie case under RCW  
13 49.60 are: “(1) [t]he harassment was unwelcome, (2) the harassment was because  
14 of sex, (3) the harassment affected the terms and conditions of employment, and  
15 (4) the harassment is imputable to the employer.” *Id.* (citing *Glasgow v. Georgia-*  
16 *Pac. Corp.*, 103 Wash.2d 401, 406-07 (1985).

17 Here, Defendants argue that Plaintiffs cannot establish that the alleged  
18 harassment “affected the terms and conditions of ... employment.” ECF Nos. 51 at  
19 15; 97 at 10-11; *Sangster v. Albertson's, Inc.*, 99 Wash. App. 156, 162 (2000).  
20 Defendants also contend that Plaintiffs cannot establish that the alleged harassment

1 should be imputed to Horning Brothers, citing their arguments discussed above  
2 regarding the *Ellerth-Faragher* defense. ECF No. 51 at 16. Defendants deny that  
3 Mr. Cruz is a manager. ECF No. 97 at 3. The State responds that the Washington  
4 Supreme Court has declined to extend the *Ellerth-Faragher* defense to the WLAD.  
5 ECF No. 75 at 19.

6 Plaintiffs-Intervenors, joined by the State (ECF No. 65), seek summary  
7 judgment and argue that Horning Brothers is strictly liable under the WLAD for  
8 Mr. Cruz's conduct as a manager. ECF No. 59 at 13. Plaintiffs argue that  
9 harassment is imputed to the employer under the WLAD where an owner,  
10 manager, partner, or corporate officer personally participates in the harassment.  
11 ECF No. 59 at 14; *DeWater v. State*, 130 Wash.2d 128, 135 (1996). Plaintiffs  
12 request that the Court find Mr. Cruz was a manager under the WLAD, whose  
13 conduct is imputed to Horning Brothers. ECF No. 59 at 14.

14 There are two categories of harassment which can be imputed to an  
15 employer. *Davis v. Fred's Appliance, Inc.*, 171 Wash. App. 348, 362 (2012). In  
16 the first category is harassment committed by "an owner, partner, corporate officer,  
17 or manager." *Id.* Once established, this type of harassment is automatically  
18 imputed to the employer. *Glasgow*, 103 Wash.2d at 407. In the second category is  
19 harassment committed by lower-level supervisors and co-workers. *Davis*, 171  
20 Wash. App. at 362. This latter type of harassment can be imputed to the employer

1 only if the employer: (1) authorized, knew of, or should have known of the  
2 harassment and (2) failed to take reasonably prompt and adequate corrective  
3 action. *Id.* The purpose of maintaining these two categories of harassment is to  
4 “distinguish[ ] between, on one hand, the class of persons so closely connected to  
5 the corporate management that their actions automatically may be imputed to the  
6 employer and, on the other hand, the employee’s supervisors and co-workers  
7 whose actions alone may not be imputed directly to the employer.” *Francom v.*  
8 *Costco Wholesale Corp.*, 98 Wash. App. 845, 853-54 (2000).

9 Courts have previously found that whether a person qualifies as an owner,  
10 partner, corporate officer, or manager depends on whether the alleged harasser is  
11 of a high enough level to be considered as the employer’s “alter ego.” *Washington*  
12 *v. Boeing Co.*, 105 Wash. App. 1, 12 (2000); *Francom*, 98 Wash. App. at 855  
13 (citing *Ellerth*, 524 U.S. at 758). Yet, this Court agrees with the Plaintiffs’  
14 argument that the Washington Supreme Court has clarified that a manager for  
15 purposes of the WLAD is a person “who ha[s] been given by the employer the  
16 authority and power to affect the hours, wages, and working conditions of the  
17 employer’s workers.” *Robel v. Roundup Corp.*, 148 Wash.2d 35, 48 n.5 (2002).  
18 The Washington Court of Appeals in *Boeing* relied on cases prior to *Robel* for its  
19 alter ego theory and thus this theory is no longer controlling. *Boeing Co.*, 105  
20 Wash. App. at 12 n.23 (citing *Francom*, 98 Wash. App. at 854-56; *Ellerth*, 524



1 U.S. at 758). Defendants also concede that the test for supervisor under Title VII  
2 and the test for manager under WLAD are similar, citing to the definition of  
3 manager in *Robel*. ECF No. 73 at 5; *Robel*, 148 Wash.2d at 48 n.5. As neither  
4 party disputes the applicability of *Robel*, this Court analyzes whether Mr. Cruz is a  
5 manager under the definition set forth by the Washington Supreme Court in *Robel*  
6 rather than the more restrictive alter ego theory.

7 Here, Plaintiffs argue that Mr. Cruz is a manager because his authority to  
8 hire and rehire indisputably affects the hours, wages, and working conditions of  
9 onion sorters. ECF No. 59 at 18. Mr. Cruz also had control over employee  
10 schedules, specifically start times, work schedules, and who could work additional  
11 hours cleaning after the usual shift. ECF Nos. 59 at 19; 60 at ¶¶ 71-74. Workers  
12 complained to Horning Brothers that Mr. Cruz offered additional hours only to  
13 preferred workers. ECF Nos. 59 at 19; 60 at ¶ 75. Mr. Cruz also had authority to  
14 approve leave. ECF No. 59 at 19; 60 at ¶¶ 76-79. Plaintiffs contend that Mr. Cruz  
15 had the power and authority to affect working conditions because he assigned  
16 workers to positions on the line and had the power to move them to new positions  
17 in the shed. ECF Nos. 59 at 19; 60 at ¶ 80. He had supervisory duties in the shed  
18 and instructed and reviewed employee work. ECF Nos. 59 at 19; 60 at ¶¶ 20-21.  
19 Mr. Cruz controlled the information employees received because the Hornings  
20

1 relied on him to communicate and interpret the “safety meetings.” ECF Nos. 59 at  
2 19; 60 at ¶¶ 22-23.

3 As Defendants concede that supervisor and manager tests are similar, the  
4 Court finds that Mr. Cruz is a manager under WLAD as the Court has previously  
5 determined that he is a supervisor under Title VII. The evidence shows that Mr.  
6 Cruz had the ability to hire employees, control their time off, control where they  
7 would work in the onion shed, and control their additional hours. Mr. Cruz is then  
8 a manager and strict liability applies.

9 The question remains whether the *Ellerth-Faragher* defense applies to the  
10 WLAD. Plaintiffs argue that the Washington Supreme Court has never adopted  
11 this affirmative defense and requests this Court find that the defense is not  
12 available to Horning Brothers under WLAD. ECF Nos. 59 at 20-21; 103 at 11.  
13 This Court agrees with Plaintiffs that the defense has never been recognized by the  
14 Washington Supreme Court, but it has been expressly adopted by Division III of  
15 the Washington Court of Appeals. *See Sangster v. Albertson’s, Inc.*, 99 Wash.  
16 App. 156, 163-167 (2000); *see also* ECF No. 97 at 6. In dicta, Division I of the  
17 Washington Court of Appeals considered the analysis in *Sangster* and stated:

18 To the extent that *Sangster* does alter the analysis in hostile work  
19 environment claims, it does so by applying federal law that  
20 Washington courts typically regard as persuasive in employment  
discrimination cases. While it seems likely that our Supreme Court,  
in an appropriate case, will adopt and follow the new federal  
precedent, in the absence of such a decision we are hesitant to follow

1 Division III in presuming that Washington's law is other than as  
2 stated in Glasgow.

3 *Barker v. Botting*, 121 Wash. App. 1030, \*5 (2004).

4 This Court finds that it need not determine whether the affirmative defense  
5 applies. As previously discussed, the defense does not protect Defendants under  
6 Plaintiffs' Title VII claim and, as WLAD's claim is similar, the Court finds that the  
7 defense would also not preclude summary judgment here even if it applied.  
8 Accordingly, the Court grants summary judgment in favor of Plaintiffs and finds  
9 that Horning Brothers is strictly liable under the WLAD for the actions of Mr. Cruz  
10 as manager.

#### 11 **D. Retaliation**

12 Plaintiffs allege a claim for retaliation in violation of Title VII and the  
13 WLAD. ECF Nos. 1 at ¶¶ 37, 43; 12 at ¶¶ 70-72. Defendants move for summary  
14 judgment on these claims. ECF Nos. 51 at 16; 58.

15 The Ninth Circuit has recognized that the framework used to analyze Title  
16 VII retaliation claims applies equally to the WLAD. *Stegall v. Citadel Broad. Co.*,  
17 350 F.3d 1061, 1065 (9th Cir. 2003). To establish a *prima facie* case of retaliation  
18 under this framework, a plaintiff must demonstrate that: "(1) she engaged in a  
19 protected activity, (2) she suffered an adverse employment action, and (3) there  
20

1 was a causal link between her activity and the employment decision.” *Id.* (citation  
2 omitted).

3 To satisfy the adverse employment action prong, “a plaintiff must show that  
4 a reasonable employee would have found the challenged action materially adverse,  
5 which in this context means it well might have dissuaded a reasonable worker from  
6 making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry.*  
7 *Co. v. White*, 548 U.S. 53, 68 (2006) (internal quotation marks and citation  
8 omitted). A causal link can be shown by direct evidence or inferred from  
9 circumstantial evidence, such as the temporal proximity between the protected  
10 activity and the employment decision and whether the employer knew that the  
11 employee engaged in protected activities. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376  
12 (9th Cir. 1987).

13 If the plaintiff succeeds in establishing a *prima facie* case, the burden of  
14 production shifts to the defendant to articulate a legitimate, nondiscriminatory  
15 reason for the action taken. *See Ramirez v. Olympic Health Mgmt. Sys., Inc.*, 610  
16 F. Supp. 2d 1266, 1284 (E.D. Wash. 2009). If the defendant states a valid reason,  
17 the burden shifts back to the plaintiff to demonstrate that the reason was merely a  
18 pretext. *Id.* Only then does a plaintiff’s case survive summary judgment. *Brooks*  
19 *v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).

1 Here, Defendants assert that Plaintiffs cannot show any of these elements.  
2 ECF No. 51 at 16. First, Defendants insist that Plaintiffs cannot show they  
3 engaged in protected activity, such as complaining to the Hornings, because none  
4 of them complained. ECF Nos. 51 at 6; 97 at 10. Second, Defendants allege that  
5 Plaintiffs cannot show that Horning Brothers ever subjected them to any adverse  
6 employment action since none of them were ever reassigned to an inferior position,  
7 demoted, or terminated. ECF No. 51 at 6. Horning Brothers argues that Yesica  
8 Cabrera Navarro cannot prove that she was constructively discharged. ECF No. 97  
9 at 10. Third, Defendants contend that Plaintiffs cannot show that a causal link  
10 existed. *Id.* Defendants note that none of the Plaintiffs who quit before the end of  
11 the packing season can prove that they were forced to quit because they reported a  
12 hostile work environment to the Hornings because none ever did so. *Id.*

13 Plaintiffs respond that Yesica Cabrera Navarro's complaint to Warren  
14 Horning in December 2014 regarding Mr. Cruz's sexual harassment constitutes a  
15 protected activity. ECF Nos. 75 at 20; 76 at ¶¶ 282-83; 78 at 17; 79 at ¶¶ 125-36.  
16 Yesica Cabrera Navarro testified that Warren Horning responded that if she was  
17 comfortable working there, she could stay, and if she was not, she could make the  
18 decision to leave. ECF Nos. 64-13 at 17 (Ex. 13); 75 at 20; 78 at 17. Mr. Cruz  
19 was present during this conversation. ECF Nos. 75 at 20; 76 at ¶ 285; 78 at 17; 79  
20 at ¶¶ 130-32. Within days of her complaint, Mr. Cruz removed Yesica Cabrera

1 Navarro from a work station he knew was tolerable for her back, given a recent  
2 injury, and transferred her to a work station that caused her pain. ECF Nos. 75 at  
3 20; 76 at ¶ 287; 78 at 17; 79 at ¶¶ 133, 138; 80-3 at 69 (Ex. C). Mr. Cruz also  
4 subjected her to yelling and humiliation in front of other employees. ECF Nos. 75  
5 at 20; 76 at ¶ 287; 78 at 17-18; 79 at ¶ 139; 80-3 at 69-70. Yesica Cabrera Navarro  
6 stated that she regretted reporting the harassment and felt she had no option but to  
7 quit to escape the intolerable conditions at Horning Brothers. ECF Nos. 75 at 20-  
8 21; 76 at ¶¶ 288-89; 78 at 18; 79 at ¶¶ 140-42; 80-3 at 68-69.

9 The State emphasizes that Defendants fail to present any evidence of a  
10 legitimate reason for her reassignment or public humiliation by Mr. Cruz, despite  
11 being aware of her testimony. ECF No. 75 at 21. Plaintiffs-Intervenors argue that  
12 a genuine dispute of material facts exists as to whether Yesica Cabrera Navarro  
13 engaged in protected activity, such as her testimony and testimony of other  
14 employees who were aware of her complaint. ECF Nos. 78 at 18; 79 at ¶¶ 53, 125-  
15 36, 182, 206, 215. Plaintiffs-Intervenors contend that the short time between her  
16 complaint, reassignment, and Mr. Cruz's verbal abuse indicate her protected  
17 activity was a motivating factor for the adverse action. ECF No. 78 at 18.

18 The Court finds there is a material question of fact as to whether Defendants  
19 retaliated against Yesica Cabrera Navarro for reporting Mr. Cruz's alleged sexual  
20 harassment. The disputed evidence shows that she reported the sexual harassment

1 to Warren Horning while Mr. Cruz was in the room, and was therefore aware of  
2 the complaint. Days later she was subjected to a transfer and alleged verbal abuse,  
3 likely constituting an adverse employment action. This short amount of time and  
4 Mr. Cruz's knowledge of the complaint likely creates a causal link. The Court is  
5 not persuaded by Defendants' argument that not a single Plaintiff reported sexual  
6 harassment when Yesica Cabrera Navarro asserts that she made a complaint in  
7 December 2014 and Warren Horning recalls having a conversation with Jose  
8 Garay and a female employee. ECF No. 64-11 at 10 (Ex. 11). While Horning  
9 Brothers argue that Yesica Cabrera Navarro complained about pain and not getting  
10 time off, this conflicting testimony creates a genuine issue of material fact and  
11 summary judgment is not appropriate. The Court finds there is a genuine issue of  
12 material fact whether Yesica Cabrera Navarro complained to Warren Horning and  
13 whether Mr. Cruz's actions constitute an adverse action because of this complaint.  
14 The Court denies Defendants' motion for summary judgment on Plaintiffs'  
15 retaliation claims.

#### 16 **E. Wrongful Termination/Constructive Discharge**

17 Plaintiffs-Intervenors allege a claim for constructive discharge in violation  
18 of Title VII in regards to Roxana Rodriguez "by subjecting her to conditions so  
19 intolerable based on unwanted sexual touching and harassment that she was  
20 compelled to quit her job." ECF No. 12 at ¶ 53. They also assert a claim for

1 constructive discharge in violation of WLAD in regards to Yesica Cabrera  
2 Navarro. *Id.* at ¶ 66. Defendants seek summary judgment on these claims. ECF  
3 No. 51 at 17.

4 Federal case law describes constructive discharge as “an employee’s  
5 reasonable decision to resign because of unendurable working conditions.”  
6 *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004). “The inquiry is  
7 objective: Did working conditions become so intolerable that a reasonable person  
8 in the employee’s position would have felt compelled to resign?” *Id.* If the answer  
9 to this question is “yes,” the employee may assert federal wrongful discharge  
10 claims despite the fact that he or she was not formally discharged. *Id.*

11 Washington case law is in accord. To prove constructive discharge under  
12 Washington law, an employee must show: (1) that the employer engaged in  
13 deliberate conduct which made the employee’s working conditions intolerable; (2)  
14 that a reasonable person in the employee’s position would be forced to resign; (3)  
15 that the employee resigned solely because of the intolerable conditions; and (4)  
16 that the employee suffered damages. *Allstot v. Edwards*, 116 Wash. App. 424, 433  
17 (2003). Intolerable working conditions exist where an employee is subjected to  
18 “aggravating circumstances or a continuous pattern of discriminatory treatment” on  
19 the part of the employer. *Id.*



1 Further, courts applying Washington law must “presume [the] resignation is  
2 voluntary and, thus, cannot give rise to a claim for constructive discharge.”  
3 *Townsend v. Walla Walla Sch. Dist.*, 147 Wash. App. 620, 627 (2008). The  
4 employee may rebut this presumption “by showing the resignation was prompted  
5 by duress or an employer’s oppressive actions.” *Id.* at 627-28. Mere subjective  
6 dissatisfaction, however, is insufficient to overcome the presumption. *Id.* at 628.

7 As an initial matter, this Court rejects any argument by Defendants that  
8 Horning Brothers cannot be held liable for the actions of Mr. Cruz because the  
9 Court has already determined that Mr. Cruz was a supervisor and manager. *See*  
10 ECF No. 51 at 18. The Court then addresses Defendants’ remaining arguments.

11 Defendants assert that Horning Brothers has never terminated an employee  
12 in the entire 20 year history of its onion packing operation. *Id.* at 17. Defendants  
13 contend that Plaintiffs cannot show that Horning Brothers deliberately made  
14 working conditions intolerable due to Mr. Cruz’s alleged sexual harassment. *Id.*  
15 Defendants insist that they were unaware that either Yesica Cabrera Navarro or  
16 Roxanna Rodriguez de Alfaro were allegedly sexually harassed because neither  
17 reported it to the Horning Brothers prior to quitting. *Id.* at 18.

18 Plaintiffs respond that genuine issues of material fact preclude summary  
19 judgment because Yesica Cabrera Navarro testified that she had no other option  
20 but to quit after Horning Brothers disregarded her harassment complaint and Mr.

1 Cruz responded with verbal abuse and reassigning her work station. ECF Nos. 75  
2 at 22; 76 at ¶¶ 282-90; 78 at 19; 79 at ¶¶ 97-120, 138-42. Plaintiffs-Intervenors  
3 also argue that a reasonable person faced with continued and unchecked  
4 harassment and retaliation would be forced to quit her employment, as Yesica  
5 Cabrera Navarro did quit and suffered damages of months without employment  
6 while she struggled to support her children. ECF Nos. 78 at 19; 79 at ¶¶ 142-45.

7 Roxanna Rodriguez de Alfaro testified that she felt she had no choice but to  
8 resign in light of Mr. Cruz's intolerable crude verbal comments, requests for her  
9 phone number and dates, and daily rubbing and squeezing of her butt because once  
10 her husband had resigned and was no longer present in the onion shed, Mr. Cruz's  
11 harassment seemed likely to escalate even further. ECF Nos. 75 at 22; 76 at ¶ 291;  
12 78 at 19; 79 at ¶¶ 62-76, 85-88. Plaintiffs-Intervenors add that she endured months  
13 without being able to find work, suffered emotionally and economically as she  
14 struggled to provide for her children and family. ECF Nos. 78 at 20; 79 at ¶¶ 91-  
15 93.

16 Horning Brothers reply that Yesica Cabrera Navarro's deposition testimony  
17 fails to establish that she suffered a hostile work environment due to sexual  
18 harassment, let alone constructive discharge. ECF No. 97 at 4. Horning Brothers  
19 emphasize her separation questionnaire and Jose Garay's denial that she  
20 complained about sexual harassment. *Id.* at 4-5. In regards to Roxana Rodriguez

1 de Alfaro, Horning Brothers concedes that she testified to sufficient facts to  
2 establish sexual harassment and possibly constructive discharge. *Id.* at 5. Yet,  
3 Horning Brothers still argues that she had other reasons for quitting because her  
4 husband had an argument with Mr. Cruz and quit, she wrecked her car close to the  
5 time that she quit, and she considered returning to the onion shed in the future. *Id.*  
6 at 5.

7       The Court finds that Plaintiffs show a genuine issue of material fact as to  
8 whether Defendants constructively discharged Yesica Cabrera Navarro and  
9 Roxanna Rodriguez de Alfaro. Merely because Defendants assert that they have  
10 never terminated an employee does not preclude constructive discharge, as  
11 Plaintiffs-Intervenors may have felt compelled to leave due to their treatment. The  
12 Court is not persuaded that no Plaintiff complained about sexual harassment, as  
13 previously discussed Yesica Cabrera Navarro possibly complained to Warren  
14 Horning and Roxana Rodriguez de Alfaro filed an HRC complaint. While Horning  
15 Brothers deny that Yesica Cabrera Navarro reported sexual harassment, the  
16 conflicting testimony creates a genuine issue of material fact. The disputed  
17 evidence creates a material issue of fact as to whether these Plaintiffs-Intervenors  
18 suffered intolerable working conditions where a reasonable person would have felt  
19 compelled to resign in light of the testimony regarding unwanted touching and  
20

1 comments. Accordingly, the Court denies Defendants’ request to grant summary  
2 judgment on Plaintiffs’ constructive discharge claims.

### 3 **F. Discriminatory Hiring and Employment Practices**

4 The State asserts a claim for discriminatory hiring practices in violation of  
5 Title VII and the WLAD. ECF No. 1 at ¶¶ 31, 39. The State also alleges  
6 segregated employment practices in violation of Title VII. *Id.* at ¶ 33. Defendants  
7 argue they are entitled to summary judgment on Plaintiffs’ claims of  
8 discriminatory hiring and employment practices. ECF No. 51 at 18.

9 Pursuant to Title VII, it is unlawful for an employer: (1) “to fail to hire or to  
10 discharge an individual, or otherwise discriminate against any individual ...  
11 because of such individual’s ... sex” or (2) “to limit, segregate, or classify his  
12 employees or applicants for employment in any way which would deprive or tend  
13 to deprive any individual of employment opportunities or otherwise adversely  
14 affect his status as an employee, because of such individual’s ... sex.” 42 U.S.C. §  
15 2000e-2(a). Under WLAD, it is an unfair practice for an employer “[t]o refuse to  
16 hire any person because of ... sex ....” RCW 49.60.180(1).

17 “[A] plaintiff establishes a *prima facie* violation by showing that an  
18 employer uses ‘a particular employment practice that causes a disparate impact on  
19 the basis of ... sex ....’” *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (citation  
20 omitted). An employer may defend “by demonstrating that the practice is ‘job

1 related for the position in question and consistent with business necessity.” *Id.*  
2 (citation omitted). Yet, “a plaintiff may still succeed by showing that the employer  
3 refuses to adopt an available alternative employment practice that has less  
4 disparate impact and serves the employer’s legitimate needs.” *Id.* (citation  
5 omitted).

6 Here, Defendants admit that most of the seasonal workers they hired were  
7 women because most of those who signed up and applied for seasonal work were  
8 women. ECF No. 51 at 19. Yet, they argue that Horning Brothers also hired men  
9 as seasonal workers in the onion shed. ECF No. 51 at 19; 97 at 10-11. Defendants  
10 assert that all the seasonal workers in the onion shed were paid and treated the  
11 same regardless of whether they were male or female. ECF No. 51 at 19-20.

12 Defendants also concede that Horning Brothers has employed up to ten full-  
13 time farm laborers for many years, all of whom are male. *Id.* at 20. Defendants  
14 argue that these full-time laborers operated heaving machinery and worked during  
15 the harvests. *Id.* They repaired and worked on structures, irrigation systems, and  
16 equipment. *Id.* Defendants note that some of full-time laborers also worked in the  
17 onion shed during the packing season, usually performing the heaving-lifting and  
18 stacking tasks. *Id.* Defendants assert that “no female has ever applied for or asked  
19 to be hired for a full-time position as a farm laborer with Horning Brothers,” but  
20

1 Horning Brothers would be amendable to hiring a female as a full-time farm  
2 laborer. ECF Nos. 51 at 20, 53 at ¶ 6.

3 The State contends that Horning Brothers assigned women exclusively to the  
4 lowest-paid, seasonal work of sorting onions, where there was no escaping Mr.  
5 Cruz as their direct supervisor. ECF No. 75 at 22. The State argues there is  
6 significant evidence that Horning Brothers only hired women to sort onions and  
7 relegated them to that seasonal role, never affording them an opportunity to  
8 compete for year-round positions at higher pay and thousands of dollars in  
9 additional bonuses. ECF Nos. 75 at 23; 76 at ¶ 294. The State contends that  
10 Defendants offer no evidence that their practice of limiting women to sorting  
11 onions was “job related for the position in question and consistent with business  
12 necessity.” ECF No. 75 at 23-24; *Ricci*, 557 U.S. at 578. The State insists that  
13 Defendants’ citation to operating heavy machinery, working during the harvests,  
14 and repairing and working structures does not justify their failure to afford women  
15 seasonal workers the opportunity to compete for year-round positions. ECF No. 75  
16 at 24.

17 The Court agrees with the State and finds that it shows a dispute of material  
18 fact as to whether Defendants only employing women as seasonal workers where  
19 all of the full-time positions are held by men has a disparate impact on the basis of  
20 sex. There is a genuine issue of material fact as to whether Defendants can

1 establish whether it is a job related practice or merely stereotyping. The Court  
2 finds that Defendants fail to justify the alleged discriminatory hiring and gender  
3 separate employment practices. The Court then denies Defendants' motion for  
4 summary judgment on these claims.

### 5 **G. Punitive Damages**

6 Plaintiffs assert they are entitled to punitive damages. ECF Nos. 1 at ¶ 46;  
7 12 at 16. Defendants seek summary judgment. ECF No. 51 at 21. As an initial  
8 matter, the Court finds that punitive damages are excluded in cases brought under  
9 the WLAD. *See Martini v. Boeing Co.*, 137 Wash.2d 357, 368 (1999). Defendants  
10 allege that punitive damages are not recoverable under Washington law and the  
11 Court agrees. ECF No. 51 at 21. The Court then only considers Plaintiffs' claim  
12 for punitive damages under Title VII.

13 In order to recover punitive damages on their federal claims, Plaintiffs must  
14 prove that Defendants intentionally "engaged in a discriminatory practice ... with  
15 malice or with reckless indifference to the federally protected rights of an  
16 aggrieved individual." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999)  
17 (internal quotation marks and citation omitted) ("terms 'malice' and 'reckless  
18 indifference' pertain to the employer's knowledge that it may be acting in violation  
19 of federal law, not its awareness that it is engaging in discrimination.").

1 An employer may be liable for punitive damages when it “discriminate[s] in  
2 the face of a perceived risk that its actions will violate federal law.” *Kolstad*, 527  
3 U.S. at 536; *see also Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212  
4 F.3d 493, 515 (9th Cir.2000) (acknowledging some instances where intentional  
5 discrimination would not give rise to punitive damages such as when the employer  
6 is aware of the specific discriminatory conduct at issue, but nonetheless reasonably  
7 believed that the conduct was lawful). Yet, the Supreme Court has held that in the  
8 punitive damages context, “an employer may not be vicariously liable for the  
9 discriminatory employment decisions of managerial agents where these decisions  
10 are contrary to the employer’s ‘good faith efforts to comply with Title VII.’”  
11 *Kolstad*, 527 U.S. at 545 (citation omitted).

12 Here, Defendants contend that given the utter lack of evidence that Horning  
13 Brothers was aware of the sexual harassment or that any of their employment  
14 practices were illegal under federal law, Plaintiffs’ claims for punitive damages  
15 must be dismissed. ECF Nos. 51 at 21; 97 at 11. The State responds that  
16 Defendants did not take seriously and immediately address complaints of  
17 harassment, and took no corrective action after receiving at least three separate  
18 notices of harassment. ECF No. 75 at 25. The Horning Brothers allowed Mr.  
19 Cruz’s harassment to continue unchecked. ECF No. 75 at 25. Plaintiffs-  
20 Intervenors also respond that they have established the essential elements for



1 intentional discrimination claims, creating a basis for punitive damages. ECF No.  
2 78 at 21. Plaintiffs-Intervenors emphasize that the Horning Brothers were on  
3 notice of Mr. Cruz's sexual harassment as early as August 2015 and took no  
4 corrective action. ECF No. 78 at 21; 79 at ¶¶ 9, 286-317. They insist that  
5 Defendants have no defense to punitive damages because Horning Brothers did not  
6 implement an anti-discrimination policy in good faith and failed to remedy Mr.  
7 Cruz's harassment. ECF No. 78 at 21.

8       The Court determines that Plaintiffs may assert a claim for punitive damages  
9 under Title VII. As previously discussed, it is possible that Horning Brothers was  
10 aware of the alleged sexual harassment because of the three complaints. Horning  
11 Brothers failed to address and investigate the complaints, as previously discussed.  
12 Plaintiffs establish that there is a material question of fact as to whether Horning  
13 Brothers knew that it discriminated in the face of the perceived risk that its actions  
14 violate federal law. Plaintiffs show that Horning Brothers may have not made a  
15 good faith effort to comply with Title VII because they did not investigate or seek  
16 to remedy these claims of sexual harassment, and made no changes to their  
17 harassment policy or Mr. Cruz's supervisory position. Plaintiffs create a genuine  
18 issue of material fact as to whether Horning Brothers were malicious or recklessly  
19 indifferent to Mr. Cruz's noticed and alleged sexual harassment when they failed to  
20 take any action besides speaking with Mr. Cruz regarding the HRC complaint.

1 Defendants fail to show a good faith effort to comply with Title VII and it is then a  
2 question of fact as to whether they are vicariously liable for punitive damages in  
3 regards to Mr. Cruz's actions. Accordingly, the Court denies Defendants' request  
4 for summary judgment on Plaintiffs' punitive damages claim.

#### 5 **H. Plaintiffs' Motions for Partial Summary Judgment**

6 The Court has already discussed and granted Plaintiffs-Intervenors' requests  
7 for summary judgment on their vicarious liability claim under Title VII by finding  
8 Mr. Cruz a supervisor, their strict liability WLAD claim as Mr. Cruz constitutes a  
9 manager, and that *Ellerth-Faragher* does not bar their WLAD strict liability claim.  
10 The Court then grants Plaintiffs-Intervenors' Motion for Partial Summary  
11 Judgment. ECF No. 59.

12 The Court has also already granted the State's request for summary  
13 judgment on Defendants' *Ellerth-Faragher* defense and the State's only remaining  
14 argument is that Horning Brothers is liable for any harassment occurring after it  
15 received actual notice of a sexual harassment complaint from the HRC. ECF No.  
16 62 at 20. The State argues that the Court should, at a minimum, grant summary  
17 judgment on the issue of employer liability for all harassment occurring after  
18 September 24, 2015, when Horning Brothers received the HRC complaint. *Id.* As  
19 the Court has already found that Horning Brothers is liable for Mr. Cruz's actions  
20 as a supervisor, the Court need not address whether Horning Brothers would also

1 have company liability, even though it is likely that this liability would also attach.  
2 *Id.* at 20-25. The Court then finds that as Horning Brothers is already liable for  
3 Mr. Cruz's actions, the Court need not address this further claim for liability.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 1. Defendant Horning Brothers, LLC's Motion for Summary Judgment (ECF  
6 No. 51) is **DENIED**.

7 2. Plaintiffs-Intervenors' Motion for Partial Summary Judgment (ECF No. 59)  
8 is **GRANTED**.

9 3. State of Washington's Motion for Partial Summary Judgment against  
10 Horning Brothers, LLC (ECF No. 62) is **GRANTED**.

11 The District Court Executive is directed to enter this Order and furnish  
12 copies to counsel.

13 **DATED** September 11, 2018.



17  
18  
19  
20

A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE  
Chief United States District Judge